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Supreme Court, U.S.
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No. 95-992

In The

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., *et al.*,
*Appellants,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Appellees.*

Appeal from the United States District Court
for the District of Columbia

## MOTION TO AFFIRM OF APPELLEE-INTERVENORS ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

Of Counsel:
Marilyn Mohrman-Gillis
Lonna Thompson
Association of America's
Public Television Stations
1350 Connecticut Ave., N.W.
Suite 200
Washington, D.C. 20036
(202) 887-1700

Paula A. Jameson
Nancy Howell Hendry
Public Broadcasting Service
1320 Braddock Place
Alexandria, VA 22314
(703) 739-5000

Lillian Fernandez
Pamela J. Brown
Corporation for Public
Broadcasting
901 E Street, N.W.
Washington, D.C. 20004
(202) 879-9600

Carolyn F. Corwin*
Caroline M. Brown
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

*Counsel for the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting*

**Counsel of Record*

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## QUESTION PRESENTED

Whether the three-judge district court correctly concluded that there is substantial evidence from which Congress could reasonably infer that Section 5 of the 1992 Cable Act furthers the government's substantial interests in assuring access to noncommercial educational television stations and does not burden substantially more speech than necessary to further those interests.

## RULE 29.1 LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.1, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting, Inc., through undersigned counsel, hereby certify that they have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public.



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Appellees, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting (collectively "the public broadcasters"), who were granted leave to intervene as defendants below, hereby move to affirm the judgment of the three-judge district court that Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 535 (1992) ("1992 Cable Act"), does not violate the First Amendment.

## STATEMENT

1. Section 5 of the 1992 Cable Act requires cable operators to carry the signals of all "qualified local noncommercial educational television stations" whose signals the cable system carried as of March 29, 1990. 1992 Cable Act § 5(c).[1/] Section 5 also requires cable operators to carry the signals of a certain number of qualified noncommercial educational television stations that request carriage. *Id.* § 5(b)(1). The number of stations that must be carried depends on the channel capacity of the cable system *Id.* § 5(b)(1)-(3).

Section 5 also creates certain channel positioning rights. Each qualified local noncommercial educational television station having a right to carriage under Section 5 must be carried, at its election, on its current over-the-air channel or its channel position as of July 19, 1985, or on another channel number that is mutually agreed upon by the station and the cable operator. *Id.* § 5(g)(5).

In enacting Section 5, Congress found that "[t]here is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations" and that the "distribution

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1/ A "qualified noncommercial educational television station" is (1) a station licensed by the FCC as a noncommercial educational television broadcast station, owned by a public agency or nonprofit entity, and eligible to receive a community service grant from the Corporation for Public Broadcasting; or (2) a station that is owned and operated by a municipality and that transmits predominantly noncommercial programs for educational purposes. *Id.* § 5(*l*)(1). A station is deemed "local" if the principal headend of the cable system is within 50 miles of the reference point of the station's principal community of license or within the station's Grade B contour. *Id.* § 5(*l*)(2).



of unique noncommercial, educational programming services advances that interest." *Id.* § 2(a)(7). Congress further concluded that "absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services." *Id.* § 2(a)(8)(D).

The cable industry supported enactment of the terms of Section 5. In 1990, appellant National Cable Television Association (NCTA), the leading cable trade association, joined with appellee Association of America's Public Television Stations (APTS) in submitting to Congress proposed legislation for must-carry requirements for public television. *See* 136 Cong. Rec. H6057, H6071 (March 29, 1990). That proposed legislation was substantially similar to the provisions ultimately enacted as Section 5. *See* page 20, *infra*.

2. At the initial stage of this case, the three-judge court held that the must-carry provisions of the 1992 Cable Act are consistent with the First Amendment and granted summary judgment for appellees. On direct appeal, this Court vacated and remanded for further proceedings. *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994).

This Court held that the must-carry provisions of the 1992 Cable Act are content-neutral and that the appropriate standard by which to evaluate their constitutionality is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech. *Turner*, 114 S. Ct. at 2469 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968)). Under *O'Brien* and *Ward*, a content-neutral regulation of speech must be sustained if it furthers a substantial government interest unrelated to the suppression of free expression, and if the restriction on speech is narrowly

tailored to further that interest. *O'Brien*, 391 U.S. at 377; *Ward*, 491 U.S. at 799; *see also Turner*, 114 S. Ct. at 2469.

Applying this standard, the Court identified three governmental interests underlying Congress's enactment of must-carry provisions: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." *Turner*, 114 S. Ct. at 2469 (citing, *inter alia*, 1992 Cable Act §§ 2(a)(8), (9), and (10)). The Court concluded that none of these interests is related to the "suppression of free expression" (citing *O'Brien*, 391 U.S. at 377), and that all are "substantial" for purposes of First Amendment analysis. *Turner*, 114 S. Ct. at 2469.

The Court remanded, however, for a determination of whether, in the plurality's words, Congress had drawn "reasonable inferences" based on "substantial evidence" that the must-carry rules will alleviate "past harms" or "anticipated harms" and would "in fact advance [the important governmental] interests" supporting the legislation. *Turner*, 114 S. Ct. at 2471, 2470 (opinion of Kennedy, J.). The plurality invited an "elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence." *Id.* at 2472.

The plurality also sought a clearer determination of whether the must-carry regulations "'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* at 2470 (quoting *Ward*, 491 U.S. at 799). Specifically, the three-judge court was instructed to make findings concerning the "actual effects of must-carry on the speech of cable operators and cable programmers" and "the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted



interest." *Id.* at 2472 (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989)).

In remanding for further findings, the Court expressly recognized that "Congress' predictive judgments are entitled to substantial deference" from the courts. *Turner*, 114 S.Ct. at 2471 (opinion of Kennedy, J.); *see also id.* at 2473 (opinion of Stevens, J.). The Court noted that the remand "is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with [the court's] own." *Id.* at 2471 (opinion of Kennedy, J.); *see also id.* at 2473 (opinion of Stevens, J.). Nor did the Court anticipate that the factual record would be complete in all respects: "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Id.* at 2741 (opinion of Kennedy, J.) (citing *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978)); *see also id.* at 2743 (Stevens, J.).

3. Following the remand, the parties conducted extensive discovery, including production of many thousands of pages of documents and depositions of over 50 fact and expert witnesses. In May 1995, the parties submitted cross-motions for summary judgment. In connection with their motions, appellees jointly submitted over 30 volumes of material from the congressional record, detailing the wealth of evidence before Congress supporting the must-carry provisions. Appellees also jointly submitted extensive additional evidence, including declarations of 25 fact witnesses and 10 expert witnesses, as well as more than 20 volumes of documents, that reinforced Congress' conclusion that the must-carry provisions further the government's substantial interests in assuring access to local broadcast stations and that

the burden of these provisions on the cable industry is quite limited.

In addition to relying on evidence submitted by the government and the commercial broadcasters in support of must carry generally, the public broadcasters submitted evidence specific to Section 5. The Public Broadcasters' Supplemental Statement of Evidence Before Congress provided over 60 pages of excerpts from the congressional record (including certain FCC materials relating to public television) that relate to and support Section 5. The public broadcasters also supplemented the evidence that had been before Congress with declarations of the president of APTS, 12 public television station managers, and three expert witnesses, who explained the particular harm public television stations had suffered (and were likely to suffer in the future in the absence of must-carry requirements) as a result of adverse cable carriage actions.[2/]

The three-judge court granted summary judgment for appellees, concluding that substantial evidence supports Congress' enactment of Sections 4 and 5 of the 1992 Cable Act and that those provisions are consistent with the First Amendment under the standards previously set out in this Court's opinion. Judge Sporkin's opinion summarized the evidence that was before Congress and the additional evidence that the parties had developed on remand. He concluded that there is substantial evidence in the extensive record that Congress compiled from which it could draw reasonable inferences that the must-carry rules are necessary to protect the viability of the broadcast industry and do not burden

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2/ The declarations and other additional evidence submitted by the public broadcasters are included as appendices to their summary judgment briefs filed in the three-judge court.



substantially more speech than is necessary. J.S. App. 6a-7a. Judge Sporkin also concluded that substantial additional evidence confirms Congress' findings. *Id.* at 7a.

Judge Jackson wrote a concurring opinion in which he noted that the evidence submitted by the parties revealed certain disputes and that ordinarily such disputes would be settled through a trial. *Id.* at 37a. He concluded, however, that, "taken at face value, the evidence before Congress in 1992 of an impending demise of local broadcasting was at least 'substantial' enough to warrant its prediction . . . in the absence of must-carry." *Id.* at 33a.

Judge Williams dissented. In his view, summary judgment should have been granted in favor of appellants. Although he disagreed with various rationales for must-carry regulation provided before Congress and by appellees' experts, Judge Williams acknowledged that some arguments in favor of must-carry regulation might be supported by evidence in the record. *Id.* at 79a-81a, 87a-88a, 89a. For example, he determined that Congress could reasonably conclude that vertical integration of cable operators and programmers created a competitive problem that would result in detriment to both commercial and public broadcasters, for which Congress might seek a solution. *Id.* at 79a-81a. Judge Williams concluded, however, that both Section 4 and Section 5 fail to meet the "narrow tailoring" test and therefore violate the First Amendment. *Id.* at 90a-110a.

## THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED

This Court should affirm the three-judge court's determination that substantial evidence supports Congress' enactment of Section 5 of the Cable Act and that it therefore does not violate the First Amendment. As an initial matter, there is no reason for this Court to engage in a second review of this case. At this point, there is no novel question of law to be determined; the only issue is whether the three-judge court correctly concluded that there is sufficient evidence to satisfy the standards set out in this Court's earlier opinion. That is not a question that warrants further expenditure of this Court's resources.

If the Court decides that it should reach the merits of this appeal, it should affirm the three-judge court's conclusion regarding sufficiency of the evidence. The three-judge court reviewed a wealth of evidence — both evidence presented to Congress and additional evidence developed on remand — that supports all aspects of Congress' decision to enact must-carry requirements.

While the public broadcasters endorse the constitutionality of Section 4, they submit that there are independent interests and independent evidence that support the need for Section 5. Moreover, Section 5 has a particularly limited effect on the cable industry. Thus, while the public broadcasters rely on many of the same arguments as the government and the commercial broadcasters, they focus in this motion on the arguments and evidence specific to Section 5. As explained in Part II below, there is more than enough evidence to show that Congress could reasonably infer that must-carry requirements for public television stations further substantial government interests and that Section 5 is carefully limited and does not burden substantially more speech than necessary.



## I. THE EVIDENTIARY QUESTION PRESENTED AT THIS STAGE DOES NOT WARRANT A SECOND REVIEW OF THE CASE BY THIS COURT.

At this stage of the proceedings, the only remaining issue involves sufficiency of the evidence. This is not a question that warrants review by this Court.

In its earlier opinion, this Court clearly articulated the legal standards that were to govern the decision of this case on remand. The Court identified government interests that it regarded as substantial and non-content-based and described the sorts of evidentiary showings that would support a conclusion that Congress could reasonably infer that must-carry requirements would further the government's interests. *Turner*, 114 S.Ct. at 2469-72. The Court's opinion also outlined the appropriate test for the "narrow tailoring"/"less restrictive alternative" branch of the *O'Brien* analysis. *Id.* at 2472. The Court stressed that substantial deference was to be given to the judgments of Congress, and that the three-judge court was not free to second-guess those judgments if there was substantial evidence to support them. *Id.* at 2471. The case was remanded to allow the three-judge court to develop a more complete record and to determine whether the evidence satisfies the standards set forth by this Court. *Id.* at 2472.

Judge Sporkin's opinion faithfully sets out the standards established by this Court. J.S. App. 2a-6a. All three judges carefully reviewed and evaluated the evidence presented on remand to determine whether it satisfies those standards. Both Judge Sporkin and Judge Jackson concluded that the evidence supporting must carry is substantial and is sufficient to satisfy the standards articulated by this Court. While not cataloging every item of evidence from the massive record the parties had presented, Judge Sporkin's opinion cites and describes key

portions of the evidence in support of every aspect of the *O'Brien* analysis. The opinion cites evidence particular to public television stations as well as evidence of more general applicability. *See, e.g., id.* at 12a, 15a & n.31.

While appellants criticize several limited aspects of Judge Sporkin's discussion of the legal standards stated in this Court's earlier opinion, these are essentially debates about nuances. The key issue at this point is whether there exists substantial evidence supporting Congress' judgment that must-carry regulation will further the legitimate government interests identified by this Court and supporting the conclusion that the legislation is narrowly tailored to serve those interests.

Appellants repeatedly have failed to establish that the must-carry provisions violate the First Amendment. The three-judge court has considered this case twice and has concluded twice that the evidence supports Congress' judgment. This Court previously has given plenary consideration to the relevant legal issues and has articulated clear standards for decision. The three-judge court has applied these standards to an extensive factual record comprising over 80 volumes. The only question remaining is whether that court correctly concluded that the evidence contained in the massive record compiled by the parties is sufficient to satisfy those standards. In these circumstances, there is no basis for the Court to expend its scarce resources in order to provide appellants with yet another plenary review of their claims.[3/] For this reason alone, the decision below should be affirmed.

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[3/] Ordinarily, this Court does not sit to rule on matters involving sufficiency of the evidence. *See McElroy v. United States*, 455 U.S. 642, 648 n.10 (1982); *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 484 n.8 (1977); *Dennis v. United States*, 341 U.S. 494, 516 (1951).



## II. THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED ON THE MERITS.

The decision below should be affirmed for the additional reason that it is correct on the merits.[4/] On the face of the opinions below, it is clear that there is substantial evidence from which Congress could draw a reasonable inference that must-carry requirements further the substantial government interests in assuring access to local public television stations. There is also substantial evidence showing that Section 5 is narrowly tailored and does not burden substantially more speech than necessary, and that there is no less restrictive alternative that would serve the government's interests as effectively. Indeed, at the time must-carry legislation was under consideration, the cable industry supported the provisions of Section 5 (*see* page 20, *infra*) — a point appellants fail to note in their jurisdictional statement.

As they did in the lower court, appellants studiously ignore the massive body of evidence before Congress when it considered must-carry legislation.[5/] However, this evidence by itself clearly constitutes a sufficient basis for enactment of Section 5. The additional evidence developed on remand confirms that Section 5 satisfies the standards set forth in this Court's earlier opinion and is therefore consistent with the First Amendment.

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[4/] As noted above, the public broadcasters' arguments will focus on Section 5 of the statute.

[5/] In fact, the table of authorities for the jurisdictional statement does not contain a single reference to the congressional record.

### A. Substantial Evidence Supports Congress' Judgment That Must-Carry Requirements For Local Public Television Stations Serve Substantial Government Interests.

This Court identified three important government interests that might be served by must-carry regulation — (1) preservation of the benefits of free, over-the-air local broadcast television; (2) promotion of the widespread dissemination of information from a multiplicity of sources;[6] and (3) promotion of fair competition in the market for television programming. *Turner*, 114 S.Ct. at 2469. There is substantial evidence in the record supporting Congress' judgment that must-carry requirements for local public television stations serve those interests.

As Judge Sporkin's opinion explains, there was substantial evidence before Congress indicating that cable systems have incentives to deny carriage or reposition local broadcast stations in order to increase their advertising revenues and favor cable programming in which they have an equity

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[6] The interest in dissemination of information from a multiplicity of sources — essentially ignored by appellants in their jurisdictional statement — is especially pertinent here in view of Congress' longstanding goal of providing universal access to public television. *See* Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)) ("it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services . . ."); H.R. Rep. No. 572, 90th Cong., 1st Sess. 1 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1799, 1801; S. Rep. No. 222, 90th Cong., 1st Sess. 1 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1772, 1779; *see generally* 47 U.S.C. § 396 (1991).



interest. J.S. App. 9a-11a.[7] Moreover, the public broadcasters presented Congress with extensive evidence that cable operators had dropped, refused to carry, or changed channel positions of public television stations in the absence of must-carry regulation. Judge Sporkin's opinion describes the results of a 1987 study, provided to the FCC by the Association of America's Public Television Stations, showing a significant number of instances in which cable operators had dropped or shifted channels of public television stations on a long-term basis. *Id.* at 12a (citing CR Vol. I.Z, Exh. 140, CR 15297-98, 15306-07).[8]

The congressional record contains extensive additional information about adverse cable carriage actions experienced by individual public television stations throughout the country in the absence of must-carry regulation. *See* paragraphs 89 through 116 of the Public Broadcasters' Supplemental Statement of Evidence Before Congress, cited at J.S. App. 12a.[9] This evidence alone was sufficient to allow Congress

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[7] In addition, as Judge Sporkin's opinion points out, appellees presented numerous expert witnesses who confirmed the existence of such incentives and the likelihood that they would increase over time. *Id.* at 14a.

[8] That study showed that public television stations had been dropped in 74 instances, with only 16 cases in which the station was later restored. Of the 128 channel repositionings reported in the 1987 study, in only 30 cases were public television stations later restored to their prior positions. J.S. App. 12a. This study, limited to public television stations, contained significantly more information about such stations than the 1988 FCC study referred to by the plurality in this Court's earlier opinion. *See Turner*, 114 S.Ct. at 2471-72.

[9] For example, the congressional record contains reports of the experiences of a number of public television stations that had been dropped by cable systems in one or more communities. This includes, among

(continued...)

to infer that in the future public television stations were likely to experience significant adverse carriage actions in the absence of must-carry regulation.[10/]

The record before Congress also includes substantial evidence that adverse cable carriage actions are likely to result in significant harm. Of course, denial of cable carriage to a public television station deprives viewers of access to unique noncommercial programming, thus cutting down on the multiplicity of information sources available to viewers — a significant injury in itself. Adverse cable actions also have the effect of depriving public television stations of a crucial

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[9/](...continued)
others, the state public television networks in Connecticut and Georgia and stations in Huntington Beach, California; Miami, Florida; Hernando, Mississippi; Indianapolis, Indiana; Dayton, Ohio; Boston, Massachusetts; East Lansing, Michigan; and New York City. Public Broadcasters' Supplemental Statement of Evidence Before Congress ¶¶ 90-93, 97, 99, 100, 103, 105, 108, 109, 114.

There was also substantial evidence that cable systems were on their best behavior while Congress was considering must-carry legislation, suggesting that adverse actions were likely to increase if Congress did not act. *See* J.S. App. 12a, 13a.

[10/] Substantial additional evidence in the record confirms this point. The expert declaration of Richard Feldman, cited by Judge Sporkin (J.S. App. 14a & n.29), presents statistical data showing a large volume of drops of public television stations in the 1985-1992 time period. The data show that, by the end of 1992, 314 public television stations had been dropped from carriage by 1,616 different cable systems. Feldman Decl. ¶ 11. The data further indicate that these drops resulted in loss of access to more than 10 million cable subscribers. *Id.* ¶ 12. The declarations of public television station managers submitted by the public broadcasters in connection with their summary judgment motion provide accounts of the many adverse cable actions experienced by a wide variety of stations during this period.



revenue source in the form of viewer contributions. Judge Sporkin's opinion quotes a particularly apt description of this phenomenon provided by FCC Commissioner James Quello in testimony before Congress:

> The dropping of a public television station can have enormous impact on a station's revenues . . . Given current uncertainties surrounding the levels of government funding for public broadcasting, declines in revenues from being dropped by cable operators can be devastating. Moreover, some advertiser supported cable networks compete with public television for programming. Increased cable revenues combined with decreases in funding place public television in a form of double jeopardy.

J.S. App. 16a n.31 (citing CR Vol. I.D., Exh. 9, CR 2409-10). Public television witnesses before Congress confirmed these points and provided examples of stations that had suffered financial harm as a result of adverse cable actions. *See* Public Broadcasters' Supplemental Statement of Evidence Before Congress ¶¶ 135-164.[11/]

Even the limited portion of the record cited in the opinions below reveals that there is substantial evidence

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[11/] The public broadcasters also submitted substantial additional evidence on this point. Jonathan Abbott, Senior Vice President of Development and Corporate Relations of the Public Broadcasting Service, whose testimony was cited by Judge Sporkin (J.S. App. 17a & n.37), explains in detail how loss of access to viewers leads to significant decreases in individual and corporate contributions to public television stations and that such revenue losses significantly weaken such stations. *See* Abbott Decl. ¶¶ 4-37. Declarations of public television station managers describe financial losses their stations have suffered as a result of adverse cable actions. *See, e.g.*, Hosley Decl. ¶¶ 9-14; Green Decl. ¶¶ 5-11.

supporting Congress' inference that Section 5 serves substantial government interests in assuring access to public television stations. The full range of material submitted by the public broadcasters on remand shows that in fact there is a wealth of evidence to support Congress' conclusion. This is more than enough to warrant affirmance of the three-judge court's decision on the first prong of the *O'Brien* analysis.

Appellants argue that additional evidence they presented on remand shows that the broadcast industry is in sound financial condition and therefore not in need of must-carry protection. J.S. 11-12. However, the preceding discussion establishes that there is ample evidence in the record showing that a wide variety of public television stations have suffered harm as a result of adverse cable actions and that such stations are likely to suffer increasing harm in the future without must-carry requirements.[12/] Congress could reasonably infer on the basis of that evidence that public television stations face significant cable carriage problems and that Section 5 would serve the government's interests.

This Court made clear in its earlier opinion that the three-judge court was not to reweigh the evidence *de novo* and that it was not free to second-guess Congress' judgments so long as there is substantial evidence to support them. "Substantial evidence" is not uncontroverted evidence; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.*

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12/ Appellants point out that some local broadcast stations have sought compensation from cable operators for carriage under the retransmission consent provisions of Section 4 of the statute. J.S. 12. There are no similar provisions in Section 5; indeed, the statute bars cable operators from accepting compensation from local public television stations in return for carriage, except in certain narrowly defined circumstances. *See* 1992 Cable Act § 5(i)(1).



*v. NLRB*, 305 U.S. 197, 229 (1938). Judge Sporkin properly noted that, under these standards, disputes among experts do not preclude a grant of summary judgment and that, so "long as there is no material dispute that there is substantial evidence from which Congress could have drawn a reasonable inference, then the government is entitled to summary judgment." J.S. App. 6a. That is clearly the case with Section 5.

### B. Section 5 Satisfies The "Narrow Tailoring" Standard.

The remaining question under the *O'Brien* analysis is whether Section 5 is "narrowly tailored" to further the interests that support it. This entails an inquiry into whether the statute burdens "'substantially more speech than is necessary to further the government's legitimate interests.'" *Turner*, 114 S.Ct. at 2470 (quoting *Ward*, 491 U.S. at 799). Here, too, the three-judge court correctly concluded that the standard set forth by this Court had been satisfied.

There can be no doubt that Section 5 is narrowly tailored. Under Section 5, the number of public television stations that a cable operator is required to carry depends on the number of channels on the system. In general, cable systems with 12 or fewer channels are required to carry only one public television signal; systems with 13 to 36 channels must carry one but no more than three public television stations. Only systems with more than 36 channels must carry all public television stations that request carriage, and even this requirement is subject to certain limitations. 1992 Cable Act § 5(b)(1), (2), & (3). On its face, therefore, Section 5 is limited in one of the ways appellants themselves have suggested. *See* J.S. 14 (suggesting that it might be reasonable for the government to "require carriage of a certain minimum number of local broadcast stations").

Section 5 has two provisions that guard against cable companies' having to carry duplicative programming. One provides that a cable operator that carries the signal of a station affiliated with a state public television network is not required to carry the signal of another station affiliated with the same network if the programming of the additional station is substantially duplicated by that of the station already carried. *Id.* § 5(b)(3)(C). Another provision states that a cable operator with a capacity of more than 36 channels that is required to carry the signals of three public television stations need not add the signals of other stations if their programming substantially duplicates that of the stations already receiving carriage. *Id.* § 5(e).[13/]

In addition, the burden on cable operators can be reduced through use of the "PEG" channel provision. Under the Cable Communications Policy Act of 1984, franchise authorities are permitted to reserve certain cable channels for public, educational, or government use. 47 U.S.C. § 531 (1988). There was evidence before Congress that a number of these "PEG" channels were not being used.[14/] Section 5 provides that if a cable operator is obliged to add a public television station under the must-carry rules, it can choose to carry that station on a PEG channel if that channel is not being used for its designated purpose, subject to the approval of the franchising authority. *Id.* § 5(d). Thus, to the extent the cable operator has unused PEG channels, it may be able to fulfill its Section 5 obligation without any burden at all.

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[13/] These provisions of Section 5 on their face demonstrate that appellants seriously mischaracterize the statute when they imply that Congress has "insist[ed] that viewers in every community receive every available broadcast station on their cable systems . . . ." J.S. 14.

[14/] 138 Cong. Rec. H6554 (July 23, 1992) (remarks of Rep. McMillen), CR VOL. I.EE, EXH. 195, CR 17128.



This Court instructed the three-judge court to conduct an inquiry into the "actual effects of must carry" on the cable industry. *Turner*, 114 S.Ct. at 2472. The additional evidence developed on remand shows that must-carry requirements have not imposed any significant burden on cable. As described in Judge Sporkin's opinion, that evidence demonstrates that cable operators have not been forced to make substantial changes in their programming as a result of must-carry requirements, even when the effects of both Section 4 and Section 5 are considered, and that any burden is likely to diminish as cable channel capacity increases. *See* J.S. App. 18a-22a.

In the case of Section 5, this result is fully consistent with Congress' expectations. There was evidence before Congress that a must-carry requirement for public television stations would impose no more than a minimal burden on the cable industry. Data provided to Congress showed that a requirement for carriage of all substantially unduplicated public television programming would have the following effects:

- 84 percent of the nation's cable systems would be required to carry one public television station;
- 13 percent would be required to carry two public television stations; and
- 3 percent would be required to carry more than two public television stations, and all of those cable systems are located in seven large television markets: New York City, Los Angeles, Chicago, San Francisco, Boston, Washington, D.C. and New Orleans.[15/]

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[15/] H.R. Rep. No. 628, 102nd Cong., 2d Sess. 71 (1992), CR VOL. I.A, EXH. 4, CR 00450.

Congress correctly observed that these effects would impose very little burden on cable.[16/]

On remand, appellants did not even attempt to argue that Section 5 imposes a significant burden on cable. This is not surprising in light of the fact that cable industry representatives had worked with public television representatives to draft the provisions that ultimately were enacted as Section 5. *See* page 3, *supra*. As the Turner appellants acknowledged below, Section 5 "fundamentally adopted the terms" of the 1990 agreement between the trade associations for the two groups.[17/] In testifying before Congress, James Mooney, President of NCTA, described the NCTA-APTS agreement as "a workable compromise guaranteeing that public television will remain an integral part of cable's basic programming package."[18/] The NCTA endorsement constitutes conclusive evidence that the cable industry did not regard must carry for public television as imposing any undue burden.

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[16/] *See id.* at 68, CR VOL. I.A, EXH. 4, CR 00447.

[17/] Turner Broadcasting Brief in Support of Summary Judgment, May 26, 1995, at 58 n.145.

[18/] *Cable Television Regulation: Hearings Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 101st Cong., 2d Sess., pt. 2, at 151 (1990), CR VOL. I.I, EXH. 16, CR 06318. *See also, e.g., id.* at 128, CR VOL. I.I, EXH. 16, CR 06295 (statement of James Mooney) ("We are perfectly happy that there should be a reasonable must-carry rule and have already worked out a compromise with the public broadcasters on a rule covering their stations, which we have jointly recommended to the committee."); *Cable TV Consumer Protection Act of 1989: Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 70 (1990), CR VOL. I.H, EXH. 15, CR 05644 (statement of James Mooney).



Instead of contending that Section 5 is not narrowly tailored (a point on which they could not prevail), appellants argue generally that Congress could have chosen various "less restrictive alternatives" to must-carry regulation. J.S. 17-19. Such "alternatives" are not sufficient to protect public television stations. It is clear, for example, that so-called "leased access," a market-oriented remedy, is not a suitable alternative for public television. Public television stations, as non-profit entities dependent on public support, cannot survive in a free market environment. If public television stations must bid against commercial entities to obtain cable access, they certainly will lose out, and Congress' goal of universal access to public television will be defeated.

Both Judge Williams and appellants argue that use of an "A/B switch" by cable subscribers is an effective alternative to must-carry. *See* J.S. App. 103a-109a, J.S. 17-18. However, as noted in Judge Sporkin's opinion, there is substantial evidence of the shortcomings of the A/B switch. J.S. App. 23a-25a. Moreover, Congress explicitly recognized that, because most public television stations operate in the UHF portion of the spectrum, the A/B switch is a particularly unsatisfactory alternative for them.[19/]

Substantial evidence supports the conclusions that Section 5 does not burden substantially more speech than is necessary to accomplish the interests that support it (and indeed imposes little burden at all) and that alternative measures would not provide equally effective protection to public television

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[19/] *See* H.R. Rep. No. 628, 102nd Cong., 2d Sess. 70-71 (1992), CR VOL I.A, EXH. 4, CR 00449-50.

Other "less restrictive alternatives" put forward by appellants are likewise unsuitable for public television stations, which have limited resources to expend on proceedings involving case-by-case adjudication.

stations. Thus, Section 5 easily satisfies the "narrow tailoring" standard.

## CONCLUSION

For the reasons stated above, the Court should affirm the district court's judgment upholding the constitutionality of Section 5.

Respectfully submitted,

*Of Counsel:*
Marilyn Mohrman-Gillis
Lonna Thompson
Association of America's
Public Television Stations
Suite 200
1350 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 887-1700

Paula A. Jameson
Nancy Howell Hendry
Public Broadcasting Service
1320 Braddock Place
Alexandria, VA 22314
(703) 739-5000

Lillian Fernandez
Pamela J. Brown
Corporation for Public
Broadcasting
901 E Street, N.W.
Washington, D.C. 20004
(202) 879-9600

Carolyn F. Corwin*
Caroline M. Brown
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

*Counsel for the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting*

*Counsel of Record

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